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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE AMERICAN ADVERTISING FEDERATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Respondents.

In accordance with Rule 37 of the Rules of this Court, and with consent of the parties, the American Association of Advertising Agencies, Inc. (the "AAAA"), the National Association of Broadcasters (the "NAB") and the American Advertising Federation (the "AAF") submit this brief as amici curiae urging that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed insofar as it

upheld a permanent injunction to prohibit the Attorney General of Texas from initiating an enforcement action under state law against airline fare advertising.

INTERESTS OF AMICI CURIAE

Together, amici herein -- the AAAA, the NAB and the AAF -- represent thousands of advertising agencies, publishers, broadcasters, advertisers and others who participate in the advertising industry. It is from this broad-based, national perspective that the amici present their views to this Court.

The AAAA is the national trade association of the advertising agency business, representing approximately 750 advertising agencies located throughout the United States. Members of the AAAA

create virtually all national advertising placed by advertising agencies, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public, with all the major national airlines among them.

The NAB, organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all of the major networks. A substantial amount of the programming and advertising broadcast by NAB members is national in scope and crosses state jurisdictions. In fact, because of the nature of the electromagnetic spectrum, individual station transmissions of local and national programs and

advertising cannot be confined within state boundaries.

The AAF, another national trade association, represents virtually all elements of the advertising industry. Among the AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations and other media. AAF members also include twenty-one national trade associations, over two hundred local advertising clubs, with 52,000 members, and over two hundred college chapters, with 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

Collectively, amici and their members are experts in communicating with the public at large. Ad agencies, for example, focus their respective professional skills -- creative, marketing, media and otherwise -- to achieve a maximum advertising impact in a cost-efficient manner. It is the job of an ad agency to induce sales of a product by devising a simple selling message that effectively and memorably presents salient information, by fashioning advertisements that will capture and focus consumer attention on that message, and by placing the advertisements in media that will efficiently reach the desired audiences. Likewise, producers and advertisers of consumer products rely on such effective advertising to compete in interstate

commerce. Broadcasters, publishers and other media rely heavily on the revenue generated by such advertising activity to provide news and information to their communities. Amici and their members therefore have a direct and continuing interest in regulatory initiatives that threaten the rights of advertisers and their agencies to communicate fully with the public.

This litigation is an outgrowth of an effort by the attorneys general of five states (Texas, California, Massachusetts, New York and Washington) to impose specialized restraints on advertising by national airlines. The initiative of those attorneys general stands in stark contrast to the acquiescence of other state attorneys general not parties to

the instant action and the contrary interpretation of the U.S. Department of Transportation, the federal agency explicitly authorized by Congress to oversee the airlines' rates, routes and services. The enforcement initiative of the five attorneys general had threatened a situation whereby national advertising messages either approved or left unchallenged by authorities in other states and by the federal government would be banned within the territories of five states.

Amici and their members are best situated to explain the practical difficulties of such a selective prohibition on the flow of national commercial speech. Advertisers, agencies and members of the media know first-hand how commercial speech is

unduly burdened when it must comply with overlapping and conflicting governmental rules. Members of amici thus have a direct and continuing interest in maintaining channels of commercial speech unclogged by governmental impediments that affect the right of advertisers to provide -- and the public to receive -- information regarding the prices of products and services.

SUMMARY OF ARGUMENT

Under the aegis of Texas law, Petitioner attempted to regulate interstate airline fare advertising in a manner that conflicts directly with federal law governing such advertising. The Fifth Circuit correctly held that Section 105 of the Airline Deregulation Act, 49 U.S.C.app. § 1305(a)(1),

preempts Petitioner's enforcement initiative.

It would be impossible for airlines -- and the agencies and media that create and disseminate their advertising -- to comply with the patchwork of state and federal regulations that would result from reversal of the Fifth Circuit. Given the multistate nature of national media, advertisers and their agencies would likely abandon a form of airfare advertising permissible under federal law and explicitly endorsed by the U.S. Department of Transportation rather than attempt to comply with burdensome and contradictory state regulations.

Confronted with such a conflict, and with the clear intent of Congress to exclude states from

regulation of that which "relates to" airfares, the rulings of this Court teach that federal law preempts Texas' attempt to regulate fare advertising. Furthermore, the "balkanization" of regulation and subsequent demise of fare advertising that would occur if the Texas enforcement effort stands would contravene the intent of Congress to create a commercial aviation industry based on robust competition.

ARGUMENT

I. IT IS IMPOSSIBLE TO HARMONIZE FEDERAL POLICY ON AIRLINE FARE ADVERTISING AND THE ENFORCEMENT INITIATIVE OF THE TEXAS ATTORNEY GENERAL.

Petitioner takes great pains to obscure one of the fundamental truths at the heart of the instant litigation. While Petitioner would have this Court

believe that "[t]he effect of the Texas law is the same as that of the FAA's anti-deception standard, and is on all fours with existing federal regulation," (Pet. Br. at 11), the reality is exactly the opposite.[1] As applied to airline

[1] In like manner, the brief amici curiae filed herein by thirty-one state attorneys general asserts that "[t]here simply is no conflict between federal law, valid federal regulations and state law." (Br. Am. Cur. at 22-26.) But to support that proposition the attorneys general are reduced to semantic acrobatics as to what is, and what is not, valid "law." The fact -- unalterable even if unpalatable to the attorneys general -- is that the federal Department of Transportation has approved the very manner of advertising that Texas and a handful of other states would declare unlawful. To deny that this set of facts presents a "conflict" is to run from reality; it is precisely such conflicts that the Supremacy Clause of the United States Constitution (Article VI) is intended to address.

advertising, Petitioner's interpretation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.46(a), stands completely at odds with the analogous federal anti-deception standard, Section 411(a) of the Federal Aviation Act (the "FAA"), 49 U.S.C.app. § 1381(a), as the U.S. Department of Transportation (the "DOT") has applied that standard. Were it not for the injunction entered below, Texas and a handful of other states would prohibit airline fare advertising specifically authorized by the DOT's interpretation of the FAA. Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir.), cert. denied, 111 S.Ct. 307 (1990).

Petitioner concedes that the DOT interprets Section 411(a) of the FAA to allow "unbundled" fare advertising --

that is, advertising in which the "base fare" for an airline ticket is noted apart from applicable taxes and other government approved surcharges. (Pet. Br. at 26-27.) Indeed, the DOT has formally proposed a regulation that would allow "unbundled" fare advertising.[2] The DOT's proposed rule would permit exactly that which petitioner would prohibit: it would allow airlines to separate base fares from departure taxes, security charges, and other government imposed or approved add-ons to the base fare.[3]

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2 54 Fed. Reg. 31,052 (July 26, 1989) (notice of proposed rulemaking). To date, these rules have not been published as final by the DOT. See 56 Fed. Reg. 53,614, 53,618 (October 21, 1991).

3 54 Fed. Reg. at 31,055 (proposed 14 C.F.R. §399.84).

While Petitioner concedes the above, however, he also contends that the DOT's policy somehow harmonizes with his interpretation of Texas law, claiming that Texas would merely "impose liability over and above federal law." (Pet. Br. at 27.) Ultimately, Petitioner's contentions collapse under their own weight insofar as they claim to enforce Texas law in a manner contrary to federal policy and in a manner consistent with that same policy.

In his effort to satisfy the needs of two masters, Petitioner apparently confuses the words of a statute with their manner of application. While it may be true that Section 411(a) of the FAA features language similar to that of the Texas

Deceptive Trade Practices Act,[4] it is beyond question that the DOT -- the federal agency charged with enforcement of Section 411(a) -- subjects that language to a completely different interpretation. In its introduction to the proposed rule, the DOT addressed its duty to safeguard consumers from deceptive airline advertising under Section 411(a):

> [T]he Department does not consider such ads [featuring "unbundled"

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[4] Compare 49 U.S.C.app. § 1381(a) ("If the Board shall find . . . that such air carrier . . . is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such practices or methods of competition.") with Tex. Bus. & Com. Code § 17.46(a) (declaring unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce").

fare information] to be unfair or deceptive provided they are clear and the total amount to be paid by the consumer can be calculated easily by adding the separately-stated fixed amounts. . . .

Under section 411, the Department is responsible for protecting aviation consumers from unfair and deceptive trade practices. These changes are intended to implement that authority fully and clearly and without placing any restrictions on the industry that are not necessary and that would tend to limit airline price competition.

54 Fed. Reg. at 31,053. It seems evident, then, that the DOT has considered the effects of Section 411(a) in its approval of the form of fare advertising rejected by Petitioner herein. See generally Alaska v. United States Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989) (describing DOT's attempt to approve separate

advertising of "base fare" and add-ons through DOT "Exemption Orders").

No two interpretations could differ more, and Petitioner therefore errs when he concludes that "Texas law and federal law and regulation remain in twain." (Pet. Br. at 27.) The stark contrast between federal regulatory policy and state "law" is all too evident. The DOT interprets the federal anti-deception statute to allow "unbundled" fare advertising, while the Texas Attorney General reads a similar Texas law to prohibit such advertising. The fact that Petitioner concedes the existence of this Hobson's choice shatters any notion of congruence between the federal policy and the Texas enforcement effort. It is in light of such a choice that this Court must

address the issue of whether federal law preempts the efforts of Texas to enforce what amici submit are needlessly restrictive policies concerning fare advertising.

II. THE STARK CHOICE CREATED BY THE TEXAS ATTORNEY GENERAL LEADS TO A COMMERCIALLY UNTENABLE SITUATION FOR THOSE WHO CREATE AND PLACE FARE ADVERTISING.

Paralleling the legal conflict between the policies of DOT and the Texas Attorney General is the practical conflict that results from overlapping and inconsistent regulatory standards. By its very nature, advertising placed in national media, such as national television broadcasts or magazines and newspapers having a national circulation, is disseminated throughout the country. As a practical matter, it

is often nearly impossible for an advertiser to pick and choose which states will, or will not, receive the advertisement.

In the case of broadcast advertising, for example, a national television or radio network can block transmission of its "feed" during particular advertising times to identified local stations. Such breaks in national transmission, however, are rare and especially costly during peak viewing periods. Moreover, breaks in transmission cannot possibly be made to correspond to particular state boundaries, for local radio and television broadcasts are designed to cover metropolitan areas, not state borders.

For example, the Texarkana market extends to cover not only Texarkana, Texas, but also Shreveport, Louisiana, and Marshall, Texas. Similarly, the El Paso, Texas broadcast area encompasses Las Crueces, New Mexico. Wichita Falls, Texas is in the same broadcast area as Lawton, Oklahoma. The Arbitron Company, Television Universe Estimates Summary 9-31 (1991).

Such overlapping of broadcast areas is even more widespread among the smaller states along the East Coast. New York City's broadcast stations cover portions of Connecticut and New Jersey as well as parts of New York State. Boston, Massachusetts, stations regularly broadcast into Maine and New Hampshire. Washington, D.C., residents receive broadcast signals from stations

located in both Virginia and Maryland. Id. The existence of nationwide cable telecasts such as those from the Turner Broadcasting Corporation's "Superstation" in Atlanta compound the severity of a particular state attorney general's decision to prohibit airline fare advertising that has been authorized by the DOT.

The difficulties inherent in the broadcast media exist as well with regard to national print media. Some national magazines are able to offer advertisers and agencies a series of "regional" editions that permit an advertiser to "customize" an advertising program to various regions of the nation. But no major national magazine has a program that would permit a break-down on a state-by-state basis.

These difficulties point up the wisdom inherent in the teaching of this Court that, even where Congress has not entirely displaced state regulation in a particular field, state law is preempted when its application conflicts with federal law. Here, for national airline advertising, it is impossible to comply with both state and federal law, creating precisely the sort of conflict that should give rise to federal preemption. "A holding of federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . . ." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (citations omitted). Accord, California Coastal

Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Hines v. Davidowitz, 312 U.S. 52 (1941).

III. CONGRESS EXPLICITLY PREEMPTED STATE REGULATION OF AIRFARE ADVERTISING BECAUSE IT "RELATES TO" AIRLINE FARES.

When Congress enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), it intended the statute to encourage and develop an air transportation system that relied on competitive market forces "to determine the variety, quality, and price of air transportation services." 92 Stat. at 1707 (§ 102(a)(9)). The Deregulation Act did not modify Section 411(a) of the Federal Aviation Act, and the DOT has since assumed the responsibility of preventing "unfair or

deceptive practices in . . . the sale" of air transportation services.

The Deregulation Act added, in Section 105, a provision to preempt any state or political subdivision from "enforc[ing] any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier." 49 U.S.C.app. § 1305(a)(1). The House Committee on Public Works and Transportation noted that the section was intended to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under [federal] authority . . . no State may regulate that carrier's routes, rates or services." H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S.C.C.A.N. 3737, 3752.

Section 105 by its explicit terms applies to all state enforcement efforts "relating to rates" of airlines, and advertising of fares by airlines clearly "relates" to rates. Regulation of fare advertising directly implicates the setting of rates because vigorous fare advertising both reflects, and contributes to, the movement of fares in free competition. Congress, by using the broad phrase "relating to," indicated its intention to preempt with the plain meaning of that functional phrase. See Shaw v. Delta Air Lines, 463 U.S. 85, 95-100 (1983); see also Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990); FMC Corp. v. Holliday, 111 S.Ct. 403 (1990); International Ass'n of Machinists & Aerospace Workers

v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

The court below rested its interpretation of Congress' plain words on the guidance of this Court in Shaw v. Delta Air Lines, 463 U.S. 85 (1983). In Shaw, presented with an analogous question of legislative intent, this Court concluded that Congress did not intend to vary the ordinary meaning of the phrase "relates to," which means having "a connection with or reference to." Id. at 96-97. There is nothing in the legislative record of the Airline Deregulation Act to suggest anything to the contrary here. Indeed, enforcement of a state law regulating fare advertising by airlines clearly contravenes the practical intent of Congress regarding the meaning and scope

of Section 105. "Section [105] ensures that the prices at which [airline ticket] sales occur to consumers, and the accompanying advertising, can proceed under a legal standard uniform nationwide." Illinois Corporate Travel, Inc. v. American Airlines, 889 F.2d 751, 754-55 (7th Cir. 1989), cert. denied, 110 S.Ct. 1948 (1990).

Any doubt regarding the reach of Section 105 should be dispelled by the interpretation of the provision given by the DOT, the agency authorized to implement Congress' intentions in this area. In letters to the attorneys general, and more recently in proposed rules and a rulemaking proceeding, DOT has made clear its position that state regulation of airline fare advertising is preempted. See Alaska v. United

States Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989) ("DOT warned the States that 'the Federal government has preempted this aspect of state advertising regulation'. . . ."); 54 Fed. Reg. 31,052, 31,053-54 (July 26, 1989) ("In particular areas the states' ability to enforce advertising rules and policies has been preempted by the DOT rules. For example, states would be preempted from regulating airline advertising of fares and schedules since DOT has specific rules covering deceptive practices in these areas."). This reading of Section 105 by the DOT, a permissible construction of the statute, should go far to eliminate any ambiguity. Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 714-15 (1985); Capital Cities

Cable, Inc. v. Crisp, 467 U.S. 691, 698-705 (1984); see Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

IV. "BALKANIZED" REGULATION OF AIRFARE ADVERTISING WILL CONTRAVENE THE INTENT OF CONGRESS BECAUSE IT WILL STIFLE AIRFARE ADVERTISING ALTOGETHER.

Petitioner asserts that enforcement of state consumer protection statutes against airline fare advertisements will make the "marketplace function better by making it function honestly." (Pet. Br. at 11.) Such "good guys vs. bad guys" oratory, however, is inconsistent with the facts of price advertising, whether for airline services or for any other goods or services.

Advertising's purpose is to draw the consumer's favorable attention to a particular product, service, or brand. Its intention is to capture a consumer's brief attention span, to engage his or her interest for the short time available in the ever-increasing clutter on virtually every medium. As the first step in the buying process, advertising supplies the consumer with basic, introductory information about the availability of a product, its primary functions, and its advantages.

Typically, ads do not attempt to provide a comprehensive recitation of information potentially relevant to a purchasing decision. Instead, they merely seek to generate initial consumer

interest in the product.[5] The consumer may then go to other points of access, including point-of-sale promotional materials and reservations clerks, and may make a final purchase decision appropriately.

In fact, a multiplicity of conflicting legal rules, both state and federal, covering airfare advertising can only create confusion and higher costs for advertisers and consumers

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5 Consumers neither expect nor desire advertisements to supply all of the information that they conceivably might need to decide ultimately whether to purchase the product. This is especially so when, as in the case of airline tickets, advertising is only an initial step in a process that <u>requires</u> interaction with sales personnel such as a travel agent.

alike.[6] Whenever regulators attempt to dictate the quantity and manner of specific information that must be included in advertisements, creative flexibility is restricted and advertising effectiveness is lessened.

When rate information such as savings, special values, and competitive fares is subject to a patchwork of differing state interpretations because in various states it is considered "incomplete" or 'misleading," price

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6 Significantly, the airline advertising guidelines issued in 1987 by the National Association of Attorneys General ("NAAG") include numerous detailed disclosure requirements in addition to those directly presented in this action. Petitioner recognizes that in adopting the guidelines the various attorneys general retained "individual prosecutorial discretion" for "variations in individual state and common law." (Pet. Br. at 6.)

competition is actually undermined. The airline and its advertising agency, discouraged by the extra costs inherent in advertising lower prices or unable to fashion an effective message in the face of a patchwork of onerous constraints, must turn away from fare advertising to compete on a different level. As the burdens of fare advertising increase, advertisers inevitably shy away from that type of advertising, so that price competition decreases.[7]

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7 There is some evidence that precisely such a shying away has taken place in airline advertising. For example, the managing director of advertising for an airline that is not a party to this litigation was quoted in 1989 as stating that "[t]he industry got away from a lot of price advertising because of the [NAAG] Guidelines . . . that probably made the industry stop fare advertising on a large scale." Airlines Win First NAAG Bout, Advertising Age, February 6, 1989, at 8.

This dilution of price competition in airfare advertising is clearly not what Congress intended. As Petitioner concedes, (Pet. Br. at 13), the "primary motivation" of Congress in enacting the Airline Deregulation Act was to eliminate many of the anticompetitive federal regulations governing airlines. By deregulating, Congress hoped to encourage competition among airlines and thereby to bring ticket prices down. To permit duplicative and inconsistent state regulation of airfare advertising would decrease that competition and, contrary to Congress' intent, halt the lowering of airfares that can result from vigorous airfare advertising. Ultimately, such a result disrupts

competition and increases costs for marketers and consumers alike.

CONCLUSION

For the reasons set forth above, the AAAA, the NAB and the AAF respectfully request that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Dated: New York, New York
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